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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1980

No. A-585

Pacific Development, Inc.
and

Valley Finance, Inc.
and

Lawrence D. Huntsman
and

Marina V. McLaren
and

Frank C. Frantz
Petitioners,

v.

United States of America
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States Government's seizure action was unconstitutional because it lacked any jurisdiction to tax foreign income of a nonresident alien.

II. Whether the United States Government can lawfully seize all the assets of a domestic corporation to satisfy an alleged tax liability of its sole shareholder, without paying the corporate debts and without following the strict statutory, procedural and other constitutional due process safeguards to which the corporation is entitled under Commissioner v. Shapiro, 424 U.S. 614 (1976) and Laing v. United States, 423 U.S. 161 (1976).

III. Whether the Circuit Court and Trial Court plainly erred when they chose to disregard the proper standards required as prerequisites to "piercing the corporate veil" enunciated in a multitude of cases and rather followed an err-

oneous interpretation of the dicta in G. M. Leasing Corp. v. United States, 514 F.2d 935 (10th Cir. 1975); 429 U.S. 338 (1977), in its determination that PDI was the "alter ego" of the stockholder.

Representation pursuant to Rule 28.1

Petitioners Pacific Development, Inc. and Valley Finance, Inc. are affiliated domestic corporations which have one other affiliate, Suter's Tavern, Inc., and several wholly owned subsidiaries.

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Pacific Development, Inc., Valley Finance, Inc., Marina V. McLaren, Lawrence D. Huntsman, and Frank C. Frantz respectfully petition this Court for a writ of certiorari to review the final judgment(s) of the Court of Appeals, docketed July 14, 1980, which affirmed

the judgments of the United States District Court for the District of Columbia.

OPINIONS BELOW

The memorandum opinion and order(s) of United States District Judge Charles R. Richey, dismissing the complaint of petitioners Valley Finance, et al., was filed April 26, 1978 and is included in the Appendix at pages 19a-31a.

The memorandum opinion of United States District Judge Charles R. Richey was filed on January 3, 1979. Orders (1) denying plaintiff's motion to strike defendant's proposed findings of fact and conclusions of law; (2) denying PDI's motion for partial summary judgment; and (3) entering judgment for the defendant are included in the Appendix at pages 32a-51a.

The order of the United States District Judge Charles R. Richey vacating the court's order of December 8, 1978 was filed on January 12, 1979 and is included in the Appendix 52a.

United States District Judge Charles R. Richey's order denying plaintiff's motion to stay execution of judgment and for a protective order

and granting the government's motion to amend the court's findings of fact was filed on February 1, 1979. That order is included in the Appendix at pages 53a-55a.

The notice of appeal filed by Valley Finance, Inc., et al. on May 16, 1978, appears in the Appendix at 56a-57a. The notices of appeal of the judgments of the U.S. District Court, entered on January 3rd and January 31st, 1979, were appealed on January 8th, 1979 and February 8th 1979 respectively and appear at pages 58a-59a; 60-61a of the Appendix. The order denying rehearing was entered on October 17, 1980 and appears at Appendix page

JURISDICTION

(i) The United States Court of Appeals filed its judgments and opinions in the cases contained in this petition on July 14, 1980.

(ii) Petitioners sought a rehearing which was finally denied on October 17, 1980.

(iii) By order of the United States Supreme

Court the time for filing a Petition for Certiorari was extended to March 16, 1981.

(iv) Petitioners invoke the certiorari jurisdiction of this Court under 28 U.S.C. § 1254(i) to review the important federal and constitutional questions presented.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution

Amendment [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment [XVI]

The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

Statutes

26 U.S.C. § 861(a)(3)

(3) Personal services.--Compensation for labor or personal services performed in the United States except that compensation for labor or services performed in the United States shall not be deemed to be income from sources within the United States if--

(A) the labor or services are performed by a nonresident alien individual terporarily present in the United States for a period or periods not exceeding a total of 90 days during the taxable year,

(B) such compensation does not exceed $3,000 in the aggregate, and

(C) the compensation is for labor or services performed as an employee of or under a contract with--

(i) a nonresident alien, foreign partnership, or foreign corporation, not engaged in trade or business within the United States, or

(ii) an individual who is a citizen or resident of the United States, a domestic partnership, or a domestic corporation, if such labor or services are performed for an office or place of business maintained in a foreign country or in a possession of the United States by such individual, partnership, or corporation.

26 U.S.C. § 861

(b) Taxable Income From Sources Within United States.--From the items of gross income specified in subsection (a) as being income from sources within the United States there shall be deducted the expenses losses, and other de-

ductions properly apportioned or allocated thereto and ratable part of any expenses, losses, or other deductions which cannot definitely be allocated to some item or class of gross income. The remainder, if any, shall be included in full as taxable income from sources within the United States. In the case of an individual who does not itemize deductions, an amount equal to the zero bracket amount shall be considered a deduction which cannot definitely be allocated to some item or class of gross income.

26 U.S.C. § 862. INCOME FROM SOURCES WITHOUT THE UNITED STATES.

(a) Gross Income From Sources Without the United States--The following items of gross income shall be treated as income from sources without the United States.

(1) interest other than that derived from sources within the United States as provided in section 861(a)(1);

(2) dividends other than those derived

from sources within the United States as provided in section 861(a)(2);

(3) compensation for labor or personal services performed without the United States;

(4) rentals or royalties from property located without the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using without the United States patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like properties;

(5) gains, profits, and income from the sale or exchange of real property located without the United States; and

(6) gains, profits, and income derived from the purchase of personal property within the United States and its sale or exchange without the United States.

(7) Underwriting income other than that derived from sources within the United States as provided in section 861(a)(7).

(b) Taxable Income From Sources Without United States. --From the items of gross income specified in subsection (a) there shall be deducted the expenses, losses, and other deductions properly apportioned or allocated thereto, and a ratable part of any expenses, losses, or other deductions which cannot definitely be allocated to some item or class of gross income. The remainder, if any, shall be treated in full as taxable income from deductions, an amount equal to the zero bracket amount shall be considered a deduction which cannot definitely be allocated to some item or class of gross income.

26 U.S.C. § 6212. NOTICE OF DEFICIENCY.

(a) In General. --If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 41, 42, 43, or 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

26 U.S.C. § 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) Time for Filing Petition and Restriction on Assessment. --Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in Section 6851 or Section 6861 no assessment of a deficiency in respect of any

tax imposed by subtitle A or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

26 U.S.C. § 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in add-

ition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. § 6331. LEVY AND DISTRAINT.

(a) Authority of Secretary. --If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the

employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and Sale of Property.--The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (d)(3), a levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

26 U.S.C. § 6861. JEOPARDY ASSESSMENTS OF INCOME, ESTATE, GIFT, AND CERTAIN EXCISE TAXES.

(a) Authority for Making.--If the Secretary believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary for the payment thereof.

(b) Deficiency Letters.--If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary shall mail a notice under such subsection within 60 days after the making of the assessment.

26 U.S.C. § 7426. CIVIL ACTIONS BY PERSONS OTHER THAN TAXPAYERS

(a) Actions Permitted.--

(a) Wrongful levy. --If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary. ...

...(c) Validity of Assessment. --For purposes of an adjudication under this section, the assessment of tax upon which the interest or lien of the United States is based shall be conclusively presumed to be valid.

26 U.S.C. § 7701. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incapatible with the intent thereof--

(1) Person.--The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.

STATEMENT OF THE CASE

The petitioners are a domestic closely-held corporation, Pacific Development, Inc. (PDI), and certain creditors of that corporation: Valley Finance, Inc., Lawrence D. Huntsman, Marina V. McLaren and Frank C. Frantz (Valley).

All the corporate stock of PDI was owned by a foreign national (the Stockholder). The corporate financial structure and details of assets owned at the relevant date (December 31, 1976) are shown in proper accounting statement form in Exhibit A and supporting schedules A-1 (Appendix pages 66a through 69a.

At the relevant date, January 17, 1978, PDI had assets of $3,500,000, owed debts for trade accounts and notes of $650,000, leaving a net worth of $2,850,000. The net worth of PDI was

represented by capital stock of $2,265,000 and earnings and profits (increased to the market value of appreciated assets) of $585,000.

PDI had filed all requisite Federal corporate tax returns, quarterly employee reports for its eight to thirteen employees, and all other Federal and State papers evidencing its corporate existance. No tax was ever alleged to be due by PDI to the government.

The corporation PDI had been formed in 1968 but had remained dormant for some years. During those dormant years the corporate formalities were not strictly observed and effectively no business was conducted. Beginning in mid-1973 however, PDI began to conduct business, hire employees, maintain a regular corporate structure including officers, directors, books of account, so that at the end of 1976 PDI had a staff of eight employees and thirteen consultants. PDI had retained an independent CPA firm which monitored its financial activities and a general counsel who advised on legal and business matters.

PDI's main business was as a middleman in international trade projects. Specific business projects engaged in prior to January 17, 1977 by PDI included the supplying of 17 asphalt plants to Korea, the export of food to Korea through a subsidiary, the sale of hogs on the New York City market, the importing of antique guns manufactured in Korea and on January 17, 1977 there was ongoing a project to export all of the electronic cash registers required (by Korean law) to be installed in each and every Korean business, the latter potentially a very lucrative project with income projected to be in the millions of dollars. It also had invested in real estate which had appreciated and in another corporation which investment had appreciated from $500,000 to $1,500,000 as of the date of trial.

The stockholder was required by other commitments to be out of the country over half of the time. Consequently, PDI also served as a clearing house for the stockholder's personal bills

and some personal functions were performed by personnel on the PDI staff. A meticulous accounting separation was maintained to insure that each and every bill paid by corporate funds was properly charged, either as a proper corporate expense, or alternatively, charged into the shareholder's personal account. The full time corporate comptroller maintained the books and records and it was his sole responsibility, utilizing a computerized accounting system established by the CPA firm, to maintain a proper set of accounting records. The adequacy of the books of account was never questioned by the Internal Revenue Service and all corporate income tax returns were accepted as filed.

Nevertheless, on January 17, 1977, and several days thereafter, the Federal Government, in the guise of collecting income taxes alleged to be due by the sole shareholder, filed Federal Tax liens in numerous jurisdictions in various parts of the country against the assets of PDI.

Those liens effectively terminated the business of petitioner PDI, and have prevented the payment of just debts of the corporation, among them, those of the petitioners, Valley Finance, et al. Thereafter, the assets of PDI were subject to levies by the Internal Revenue Service.

No "notice of deficiency" was ever sent to PDI, as required by Internal Revenue Code § 6861(b), nor was any "probable cause" hearing ever held to determine whether or not the assessment by the government had any reasonable basis, either as to whether any tax was due and owing, or as to whether the government's assertion that PDI was the "alter ego and nominee" of the sole stockholder and hence liable for the tax alleged to be due by the stockholder.

The only evidentiary hearing that was ever held was the trial of the case in the United States District Court. At that trial unrebuted evidence proved that the government's theory of taxation was that the taxpayer/stockholder had received approximately 10 million dollars in commission

income as "United States source income". (Testimony and reports of Special Agent Siddall.) However, PDI (alleged to be the "alter ego and nominee" of the stockholder), proved at trial that the factual basis for that contention was totally erroneous in that the income sought to be taxed was not "U.S. source income" but rather foreign commissions earned elsewhere and never received or earned by the stockholder in the United States. (Testimony of Grover Connell and Exhibits related thereto.) No countervailing evidence was ever received or even alleged to exist by the government on this point.

Further, substantial evidence was presented by the petitioner, also unrebutted, that the alien stockholder/taxpayer spent over 50% of his time out of the country and was not therefore, a resident of the United States. No countervailing evidence was ever presented to the court by the government on the question of residency vs. non-residency.

The trial court in its memorandum opinion filed January 3, 1979 under "Findings of Fact" (Appendix page 42a) stated "... as a nonresident alien, [only] Park's United States source of income was subject to federal income tax." Earlier in its memorandum opinion under "II. Circumstances Necessary for Voiding the Insulation of Incorporation" the stockholder was termed "the wealthy nonresident alien shareholder". (Appendix page 36a.

When the petitioner moved for a stay of execution on the basis that since the taxpayer was a nonresident alien, and there was no U.S. source income, there was no tax due, the court, in compliance with the government's request, without hearing, and over petitioners' objection, changed its findings of fact, despite the lack of a scintilla of evidence to support the alteration. The court's modification of its facts removed the finality of the court's previous findings of fact as to where the stockholder resided and substituted language

carefully designed to leave the government some rational basis for assertion of a tax liability. Basically, what the government belatedly requested and what the court compliantly granted was to change the findings of fact from a determination that the stockholder is a nonresident alien for tax purposes to a conclusion that the taxpayer "believing himself to be a nonresident, ... wanted to avoid United States source income which would be nevertheless subject to federal [income] tax." Significantly, there was no finding, nor any allegation, that the corporation, PDI, was used for any such purpose.

The District Court ignored the failure of the government to follow the mandatory provisions of the Internal Revenue Code, the Constitutional arguments of the petitioner, the fact that no valid theory of taxation had ever been asserted nor proven by the government at trial, the fact that the petitioner had proven at trial that all the theories of tax relied upon by the government

were erroneous, and that as a consequence, there was no income subject to the taxing jurisdiction of the United States.

The lawsuit of the aggrieved third party creditors was dismissed for lack of priority despite the government's failure to respond to requests for admissions which (again) proved no valid basis for the tax assessed.

The petitioners claimed in the District Court and in argument before the Circuit Court that the government had no jurisdiction whatever to seize PDI's assets, since the petitioner had proved by unrebutted evidence that there was no income subject to tax in the United States.

The Circuit Court affirmed the District Court on July 14, 1980, and ignored the petitioner's proof that the government lacked jurisdiction to tax (which was based upon the proof at trial that the government's entire theory of tax was erroneous), and the statutory and Constitutional violations of the Internal Revenue Service in

unlawfully seizing the assets of PDI. The Circuit Court instead relied upon an "alter ego" theory (contrary to this court's standards set forth in G.M. Leasing, supra) and the right of the stockholder to seek Constitutional relief in the United States Tax Court. (Not available to PDI.)

From this result, which is contrary to this Court's mandate in Shapiro and Laing and G.M. Leasing, supra, the petitioners respectfully request this review.

JURISDICTION BELOW

The United States District Court had jurisdiction under 26 U.S.C. § 7426(a), which confers standing to sue in a Federal Court upon PDI, a third party whose assets have been seized incident to a tax collection action. Valley Finance, Inc., likewise has standing to sue under 26 U.S.C. § 7426(a) because it claimed a lien on real property taken by the government lien and seizure.

The three general creditors of PDI, McLaren, Huntsman and Frantz, claim jurisdiction under

§ 7426 because they likewise were deprived of property by the government's (illegal) seizure action.

REASONS FOR GRANTING THE WRIT

General Statement Illustrating the Importance of this Case:

The government's awesome power to destroy any domestic business is illustrated by this case. The Internal Revenue Service, unilaterally and without following the mandatory procedures of the Internal Revenue Code, erroneously and arbitrarily determined that it had the jurisdiction to act in the seizure of all the assets of a domestic corporation to satisfy the alleged tax liability of the corporation's stockholder.

No pre-seizure nor prompt post-seizure hearing was ever held to determine whether (1) any income was subject to tax by the alleged "taxpayer", nor (2) if a sufficient nexus existed between the corporate third party whose assets were seized and the "taxpayer" alleged to owe

the tax (3) nor was any fraud or public wrong even alleged which would form the foundation for a conventional "piercing of the corporate veil".

The government's arbitrary and capricious actions in this case violate the mandate of Congress and the decisions of this Court in Shapiro and Laing, supra. If the government's actions against petitioner are allowed to become a policy of general application, each and every close corporation 1/ may be similarly destroyed, at whim, by the Internal Revenue Service erroneously asserting that some undefined tax is due, utilizing its power of jeopardy without limitation of any kind. In order to formulate legal barriers to prevent further abuse, to redress the grievances of petitioners and to require adherence to the principles outlined by the Supreme Court in Shapiro and Laing, supra, the writ should be granted.

1/ Current estimates are that there are approximately two million close corporations in the United States with between $100,000 and $3,000,000 in capitalization. (Source: National Small Business Association.)

I. The government's seizure action was unconstitutional because it lacked any jurisdiction to tax foreign income of a nonresident alien.

No hearing was ever held by the government to determine whether there was any reasonable factual basis for seizing PDI's assets to satisfy the taxpayer's alleged tax liability.[2/] Thus, the trial of the case was the first and final fact finding hearing held in this case. As explained below, however, the trial court made no probable cause determination, and erroneously perceived the nexus issue.

At trial the government failed to come forward with any evidence to support the validity of the taxes asserted, relying entirely upon 26 U.S.C. 7426(c) which states:

2/ These two elements are required to be proven to the level of probable cause by Commissioner v. Shapiro, 424 U.S. 614 (1976) at a hearing held before or immediately after seizures of assets of a third party to satisfy an income tax liability.

> "(c) Validity of assessment. --For purposes of an adjudication under this section, the assessment of tax upon which the interest or lien of the United States is based shall be conclusively presumed to be valid."

The petitioner, PDI, proved at trial by unrebutted evidence that the income alleged to be "United States source income" in the government's assessments was in fact foreign commission income earned by the nonresident alien stockholder on export sales of grain to Korea. Thus, none of the income was subject to the taxing jurisdiction of the United States created under the authority of the Sixteenth Amendment to the Constitution of the United States.[3/]

3/ Although never asserted in the assessment or record of this case, the issue of whether the stockholder was a resident alien or nonresident alien might have presented the government with some possibility of a viable theory of taxation. However, the government at trial never asserted this basis for tax. The record shows clearly, however, by uncontroverted evidence that the stockholder was an alien who spent over 50% of his time out of the country. Indeed in response to the overwhelming evidence of nonresidency the trial court, in its initial findings of fact (later improperly modified), ruled that "...[A[s a nonresident alien, Park's United States source income was subject to federal income tax."

However, the trial court, when presented by the petitioner 4/ with the proposition that the foregoing fact precluded as a mater of tax law any liability for tax, the court (at the request of the government, changed its findings of fact to a finding that the stockholder merely alleged he was a nonresident alien.

Because the record of this case shows clearly that the United States Internal Revenue Service acted without jurisdiction to tax and erroneously determined that foreign income was subject to United States income tax, it follows that its entire course of action was illegal and void.

For this reason, the writ should issue.

II. The United States Government cannot lawfully seize all the assets of a domestic corporation, without paying the corporate debts, to satisfy an alleged tax liability of its sole stockholder without following the strict statutory proced-

4/ The petitioner filed a motion for stay of execution of judgment pointing out the glaring error in the trial court's logic which precluded judgment for the government.

ural and other constitutional due process safeguards to which the corporation is entitled under Commissioner v. Shapiro, 424 U.S. 614 (1976); Laing v. United States, 423 U.S. 161 (1976).

In this case it is undisputed that the government failed to issue a "notice of deficiency"[5/] to the petitioner corporation PDI. The trial court and the circuit court erroneously determined that notice to the stockholder constituted actual notice to the corporation, ignoring the effect of the denial of the "ticket to the tax curt" which resulted in the destruction of the corporate business.

The government by its assessment, the trial court in its decision, and the circuit court[6/] in its

5/ A notice of deficiency, known popularly as the "ticket to the tax court" is required to be issued by the Secretary within 60 days of the assessment. IRC § 6861(b). None was ever issued to PDI in this case.

6/ The circuit court suggested that constitutional challenges could be raised by the stockholder before the tax court citing Knowles v. Hirsch, 65F. Supp. 690 (D.D.C. 1946). This reasoning is faulty because the tax court as an administrative court has no authority to award damages or other equitable relief requested by petitioners herein.

affirmance determined that because the corporation was the "alter ego" of the stockholder, the corporation was not entitled as a separate entity to any recognition, notice, or separate statutory and constitutional due process safeguards to which it otherwise would have been entitled. The Supreme Court has held that

> "denying a tax court forum to a particular class of taxpayers is sufficiently anomalous that an intention to do so should not be inputed to Congress where the statute does not expressly so provide. This is particularly so in view of the government's concession that the jeopardy assessment procedures of Secs. 6861, et seq. are sufficient to protect its interests, and that providing taxpayers with the limited protection of those procedures would not impair the collection of revenues." Laing v. United States, 423 U.S. 161, 176-77 (1976).

PDI was denied the opportunity to contest

the "alter ego" determination prior to the total destruction of the viable corporate business by the withholding of its "ticket to the tax court" on the grounds that the corporation was the "alter ego" of the stockholder and therefor, entitled to no hearing before (or imediately after) the seizures. Thereafter, to urge before the United States District Court that as a third party, the corporation is bound by the (however faulty) reasoning of the Commissioner in his tax determination, can be nothing but ingenuous. These acts of the IRS represent an outrageous abuse of power by the federal government which flys in the face of previous Supreme Court mandates.

In this case the government has taken a position equivalent to that taken in Shapiro, supra, at 630, wherein it was stated:

> "... it has absolutely no obligation to prove that the seizure has any basis in fact no matter how severe or irreparable the injury to the taxpayer and no matter how inadequate his eventual remedy in the tax court".

The Supreme Court rejected that claim stating:

> "... that the party whose property is to be taken be given an opportunity for some kind of post deprivation hearing at which some showing of probable validity be made". Shapiro, supra, at 629.

Accord: Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974); North Georgia Finishing, Inc. v. Di-Chem., Inc., 419 U.S. 601 (1975).

III. The Circuit Court and Trial Court plainly erred when they chose to disregard the proper standards required as prerequisites for "piercing the corporate veil" enunciated in a multitude of cases and rather followed an erroneous interpretation of the dicta in G. M. Leasing Corp. v. United States, 514 F.2d 935 (10th Cir. 1975); 429 U.S. 338 (1977), in its determination that PDI was the "alter ego" of the stockholder.

The "alter ego" reasoning of the government under the purported authority of G. M. Leasing Corp. v. United States, 429 U.S. 338 (1977) does

not and should not be expanded to modify or reverse the principles established by this Court in Laing, supra, which is the result of the Circuit Court's decision herein.

The legal standard for a "piercing of the corporate veil" has by numerous cases been well established. In this case the government seeks to greatly expand the scope of situations where the government can assert the "alter ego" theory without demonstrating the historical requirement of fraud or grossly unconsionable conduct [See generally, United States v. Plastic-Electro Finishing Corp., 313 F. Supp. 330, 333-334 (E.D. N.Y. 1970) aff'd meM. 71-1 U.S.T.C. para. 9421 (2nd Cir. 1971) and Quinn v. Butz, 510 F.2d 743 (D.C. Cir. 1975; Avco Delta Corp. Canada Ltd. v. United States, 540 F.2d 258 (7th Cir. 1976), cert. denied, 42 U.S. 1040 (1976), and other progeny.]

In those cases the element of fraud or wrongful conduct is an essential factor in making an

alter ego determination. The G. M. Leasing, supra, cases stand for the proposition that where there is no business activity the government may disregard the corporate form, where a clear intent is present to interfere with the otherwise valid tax collection process.

The government has simply not satisfied in any respect the requirements of the very cases relied upon by the lower courts, because it has the lower courts, because it has not demonstrated a single instance of fraud, tort or statutory violation. Further, PDI has demonstrated that it was well capitalized (See Exhibit A, Appendix 66a and 67a and had substantial business activities.

For these reasons, the lower courts clearly misapplied the standard for "piercing the corporate veil" via its alter ego theory.

For this and other reasons set forth above, the petition for the writ should be granted.

CONCLUSION

Approximately two million small U.S. corporations of a comparable size to the petitioner, PDI, are owned by sole stockholders. If, at whim, the government can act ex parte in contravention of explicit dictates of Congress, and the standards established by this Court, and destroy, at will, any corporation owned by one individual, then the rule of reason and law in Internal Revenue matters is lost.

The reliance of the government and the lower courts upon the specious reasoning of the "reverse piercing of the corporate veil", i.e., the "alter ego" theory is not properly applicable without a clear showing of overt public wrong, a fraud against the public interest or the contravention of a strong public policy. To apply this theory merely for purposes of the purported collection of a nonexistent tax based upon nonexistent jurisdiction cannot have been the intent of Congress in formulating the Internal Revenue Code. Had

it been so however, under the clear facts of this case, that objective (to tax foreign income in the hands of a nonresident alien) would clearly have been unconstitutional.

The acts of seizure by the Internal Revenue Service of petitioner's corporate assets without payment of the just debts of the corporation, when all of the facts of record indicate no tax can possibly be due, is a destructive, arbitrary and capricious activity, not justified by the spirit or intent of any part of the Constitution of the United States nor of any just interpretation of the Internal Revenue Code upon which the entire fiscal structure of the federal government depends. The actions of the Internal Revenue Service in this case indicate that it may act on its own, arbitrarily and ex parte and that its activities are as a matter of practice, beyond the control of the judiciary and beyond the reach of the Constitution which is the foundation of this Republic.

The petitioners therefore, respectfully request that the petition be granted in order to

establish the right of the petitioners to their respective properties, to assess the damages to the parties harmed, and to assess attorney's fees, all as deemed appropriate by the court.

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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Appendix A

Supreme Court of the United States

No. A-585

VALLEY FINANCE, INC., ET AL.,

Petitioners,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s), .

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 16, 1981.

/s/ Warren E. Burger

Chief Justice of the United States

Dated this 8th

day of January, 1981

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1585

VALLEY FINANCE, INC., *et al.*, APPELLANTS

v.

UNITED STATES OF AMERICA, *et al.*

No. 79-1151

PACIFIC DEVELOPMENT, INC., APPELLANT

v.

UNITED STATES OF AMERICA, *et al.*

No. 79-1301

PACIFIC DEVELOPMENT, INC., APPELLANT

v.

UNITED STATES OF AMERICA, *et al.*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action Nos. 78-0089 and 77-0690)

Argued May 12, 1980

Decided July 14, 1980

Judgment entered
this date

Walter T. Charlton and *Richard T. Sampson* with whom *E. William Tupling* was on the brief, for appellants.

Daniel F. Ross, Attorney, Department of Justice with whom *M. Carr Ferguson*, Assistant Attorney General, *Carl S. Rauh*, United States Attorney at the time the brief was filed, and *Crombie J. D. Garrett* were on the brief, for appellees. *Charles F. C. Ruff*, United States Attorney, and *Myron C. Baum*, *William A. Friedlander*, *S. Martin Teel, Jr.*, Attorneys, Department of Justice, also entered appearances for appellees.

Before: TAMM and MIKVA, *Circuit Judges* and GESELL,* *United States District Court Judge* for the District of Columbia.

Opinion for the Court filed by *District Judge* GESELL.

GESELL, J.: These companion appeals were consolidated for argument with consent of counsel and will be dealt with in a single opinion. They arise from a jeopardy assessment for income taxes exceeding 4.5 million dollars made by the Internal Revenue Service ("IRS") against one Tongsun Park on January 18, 1977. The IRS seized assets of Pacific Development, Inc. ("Pacific"), a corporation wholly owned by Park, claiming that the company was a mere alter ego of the taxpayer. Pacific, incor-

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

porated in the District of Columbia in 1968, officially engages in the business of international brokerage and consulting. Park was its founder, president, and continuous sole shareholder. In an action brought under 26 U.S.C. § 7426(a)[1] and 28 U.S.C. § 2410,[2] Pacific sought return of its property and damages. The District Court upheld the seizure after finding that Pacific was not a separate entity for tax purposes but "a mere instrumentality of Park and a facade for his operations."[3]

As appellant in Nos. 79-1151 and 79-1301, Pacific challenges the District Court's factual determination of its alter ego status, claiming that such a finding is clearly erroneous on the record. In addition, it contends that the United States violated its statutory rights by failing to provide notice of deficiency, and that the absence of a prompt post-seizure hearing amounts to a violation of its right to due process of law under the Fifth Amendment to the Constitution.[4] Appellants in No. 78-1585 are

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[1] Section 7426 of the Internal Revenue Code authorizes civil actions by persons other than taxpayers:

> (a) *Actions permitted*
>
> (1) *Wrongful levy.*—If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. . . .

[2] Under 28 U.S.C. § 2410, a party may bring suit against the United States "to quiet title to real or personal property on which the United States has or claims a mortgage or other lien."

[3] Memorandum Opinion, January 3, 1979, at Pacific Joint Appendix ("PJA") 7.

[4] Pacific also asserted a Fourth Amendment claim in its papers, but abandoned that position prior to oral argument.

various creditors of Pacific[5] who sought to challenge the seizure on the same statutory and constitutional grounds. They proceeded by separate suit against Pacific and IRS under 26 U.S.C. § 7426(a),[6] and also by attempted intervention in the main Pacific action described above. They appeal from dismissal of their separate action on jurisdictional grounds.

The two actions progressed below along distinct tracks. Pacific filed suit on April 21, 1977, while the creditors did not bring an action until some nine months later. The District Judge granted the Government's motion to dismiss the creditors' action, at the same time denying the creditors' motion to intervene as party plaintiffs in Pacific's lawsuit.[7] Following extensive discovery, the main action was tried to the Court and judgment was entered for the United States.[8] We conclude that Pacific's creditors properly were barred from maintaining suit, and find no statutory or constitutional infirmities in the action taken by the IRS as to Pacific. Accordingly, we affirm the District Court's judgment in all respects.

Assuming it prevails on one or more of the three points raised, Pacific claims it is entitled to money damages and attorney fees under relevant statutory authority. In light of our disposition of the substantive claims, we need not reach this separate matter of statutory interpretation.

[5] Of the four plaintiffs in this action, three claimed to be owed monies for various services performed as salaried employees or consultants of Pacific. The fourth plaintiff was Valley Finance, Inc. ("Valley"), a corporation also wholly owned by Tongsun Park. Valley loaned money to Pacific, and held a second deed of trust on certain real property as collateral for the loan.

[6] Pacific did not answer the complaint or otherwise contest the existence of the debts alleged.

[7] *See* Memorandum and Orders, April 26, 1978, at Valley Joint Appendix ("VJA") 5-11.

[8] *See* Memorandum Opinion and Orders, January 3, 1979, and February 1, 1979, at PJA 1-11, 25-26.

STANDING

Following a lengthy investigation into the tax liability of Park, the IRS concluded that Park owed some 4.5 million dollars in personal Federal income taxes for the four-year period ending December 31, 1975. The IRS, believing that immediate action was necessary to safeguard collection of this substantial deficiency, entered a jeopardy assessment against Park on January 18, 1977. *See* 26 U.S.C. § 6861 (1976). Park was sent a statutory notice of deficiency within the applicable 60-day time period. 26 U.S.C. § 6861(b) (1976). He then petitioned the United States Tax Court, seeking a redetermination of the deficiency. *See* 26 U.S.C. § 6213(a) (1976). That action, which concerns the merits of the taxpayer's liability under the Internal Revenue Code, is still pending before the Tax Court.

Meanwhile, based on the apparent exigencies of the situation, the IRS moved quickly to ensure collection. Once demand for payment went unheeded, the IRS immediately filed notices of tax liens against the taxpayer himself and against Pacific as the "alter ego and nominee" of Park. *See* 26 U.S.C. § 6321 (1976).[9] It followed up this action by instituting levies or seizures of various

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[9] Section 6321 reads in its entirety as follows:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

Notices of lien were filed January 19, 20, and 24, 1977. The record contains 17 separate notices, eight addressed to Tongsun Park and nine to Pacific. They were filed with local court clerks and recorders of deeds in California, Maryland, Virginia, the District of Columbia, and New York. *See* PJA 78-94.

properties belonging to Pacific, including bank account deposits, shares of stock, a life insurance policy and several automobiles. *See* 26 U.S.C. § 6331 (1976).[10] These liens and levies are still outstanding. Attachment by the Government will continue until the Tax Court resolves the nature and extent of Park's tax liability. The apparent effect has been to shut down Pacific's operations and deny payment to all complaining creditors.

No issue arises as to Pacific's right to challenge seizure of its property. However, an initial question addressed by the District Court and raised on appeal concerns whether or not Pacific's creditors have standing to test the action taken by the IRS.

Standing to sue in federal court is conferred on complainants alleging concrete injury to an interest that is "arguably within the zone of interests" to be protected by the statute in question. *Association of Data Process-*

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[10] Section 6331 provides in part as follows:

> (a) *Authority of Secretary or delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax . . . by levy upon all property and rights to property . . . belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. . . . If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.
>
> (b) *Seizure and sale of property.*—The term "levy" as used in this title includes the power of distraint and seizure by any means. . . .

The actual levies occurred between March 8, 1977, and September 28, 1977. In each instance, a notice of levy or seizure was sent to the property-holder. *See* PJA 143-47.

ing Serv. Orgs. v. *Camp*, 397 U.S. 150, 153 (1970). In this instance, all complainants sue as persons other than taxpayers, claiming protection under 26 U.S.C. § 7426 (a). The provision permits actions challenging a levy by the United States only if the plaintiff "claims an interest in or lien on" the property at issue. Pacific's creditors allege such an interest, arguing that any claim for payment on an outstanding debt amounts to an "interest" protected under the statute. At the outset, we must decide which of the interests asserted below arguably falls within the terms of the statute.

Section 7426 of the Internal Revenue Code was enacted as part of the Federal Tax Lien Act of 1966.[11] Recognizing that the Government's rigorous tax enforcement activities at times encroached upon persons other than the delinquent taxpayer, Congress sought to provide a measure of protection for the property rights of these third parties. *See* S. Rep. No. 1708, 89th Cong., 2d Sess. 29, *reprinted in* [1966] U.S. Code Cong. & Admin. News 3722, 3750. In so doing, Congress created a new exception to the broad statutory rule prohibiting suits in restraint of federal tax assessment efforts. 26 U.S.C. § 7421 (a) (1976 & Supp. II 1978). This exception is precisely drawn and of limited scope. The statutory language, by effectively equating the terms "interest" and "lien" and relating both to "property," indicates that only persons claiming specific, possessory rights are entitled to seek judicial review. Subsequent discussion of relief affordable when property interests are found "superior to rights of the United States in such property" conveys a similar understanding that litigants must advance a particular, secured interest. 26 U.S.C. § 7426(b)(1) (1976). This traditional reading of the term "interest"

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[11] Pub. L. No. 89-719, § 110(a), 80 Stat. 1142.

is consistent with usage elsewhere in the Act.[12] It is further supported by a legislative understanding that the Act as a whole "substantially improves the status of private secured creditors." [13]

As already indicated, Pacific, the actual owner of the various properties levied or seized by the Government, unquestionably has standing under section 7426(a). It is equally apparent, however, that Pacific's three general creditors lack standing to sue. Their mere claim of a contractual right to be paid, unsecured by a lien or other specifically enforceable property interest, does not provide judicial access. To hold otherwise would invite litigation from numerous parties only remotely aggrieved by IRS levies, with consequent disruptive effects on federal tax enforcement. Congress intended a far narrower right to sue, and we see no reason to deviate from that clearly expressed design.

The situation as to Valley Finance, Inc. ("Valley") is somewhat different. Valley held a second deed of trust on the land and premises at 1604 K Street, N.W., Washington, D.C., making it a partly secured creditor of Pacific.[14] This deed of trust, entered into on February 15, 1977, and recorded one month later, is the type of property interest which does confer standing. *Flores* v. *United States*, 551 F.2d 1169, 1171 (9th Cir. 1977). The interest asserted in this instance, however, is clearly

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[12] *See, e.g.*, Pub. L. No. 89-719, § 101(a), 80 Stat. 1125, *codified at* 26 U.S.C. § 6323 (1976); S. Rep. No. 1708, *supra* at 3, *reprinted in* [1966] U.S. Code Cong. & Admin. News 3722, 3724 (identifying interests having priority over tax liens).

[13] S. Rep. No. 1708, *supra* at 2, *reprinted in* [1966] U.S. Code Cong. & Admin. News 3722, 3723; H.R. Rep. No. 1884, 89th Cong., 2d Sess. 2 (1966).

[14] The deed of trust was valued at $110,500, less than the $122,500 that Valley previously had advanced to Pacific.

junior to that claimed by the Government. The Federal tax lien, which was filed on January 19, 1977, with the Recorder of Deeds in Washington, D.C., attached to all property owned by Pacific as of that date. Pacific's subsequent transfer by deed of trust was therefore a conveyance without legal effect. *See generally United States* v. *Pioneer American Ins. Co.*, 374 U.S. 84 (1963). Valley's claim is not one on which relief can be granted, and it was properly dismissed.[15] Accordingly, we consider only the various challenges by Pacific to the legality of IRS conduct.

NOTICE AND HEARING RIGHTS

In the first instance, Pacific claims to have been denied certain procedural rights due under the Internal Revenue Code. The failure to provide it with a notice of deficiency following the jeopardy assessment is said to invalidate the liens and levies imposed. Notice is a jurisdictional prerequisite under sections 6861(b) and 6212(a) of the Code. *DaBoul* v. *Commissioner of Internal Revenue*, 429 F.2d 38 (9th Cir. 1970). Pacific contends that having not received notice, it was effectively denied any opportunity to litigate before the Tax Court. Because such foreclosure is not expressly permitted by statute, Pacific urges that the IRS proceeded in

[15] In view of the priority established by the Government's tax lien, the precise date of the levy challenged by Valley is of little importance. The *absence* of a levy would mean that suit could not be brought under section 7426(a) as to the particular property. We note, however, that on September 28, 1977, the IRS levied upon 100% of the Pacific stock owned by Tongsun Park. *See* Statement of Undisputed Facts, ¶ 12, VJA at 18. With its action, the government effectively took possession of all corporate assets not previously seized. This final act of distraint constituted a levy against the real property in question, under the broad statutory construction given to that term. *See* 26 U.S.C. § 6331(b) (1976). Thus Valley's claim was properly raised, although no relief is available.

an unlawful manner. *See Laing* v. *United States*, 423 U.S. 161, 176 (1976).

The plain language of the statutory provisions at issue, however, compels a contrary result. Under section 6212, it is the *taxpayer* who is entitled to notice of deficiency, and thereby assured of access to the Tax Court in order to contest his tax liability. By requiring notification of the individual whose delinquency is at issue, Congress reasonably conferred the right to seek redress only on the party directly at risk. *See Graham* v. *United States*, 243 F.2d 919, 922 (9th Cir. 1957). In this instance, Park, the taxpayer, duly received notice and was able to seek redress in the Tax Court.

The claim that Pacific also is entitled to notice of Park's deficiency must be rejected. The IRS has asserted that Pacific, although a separate legal entity, is for these limited purposes simply an extension of the taxpayer, Park. If, as the Government contends, Pacific is identified as Park's alter ego, then Pacific possesses no separate statutory rights to additional notice. *See generally G. M. Leasing Corp.* v. *United States*, 429 U.S. 338, 350-51 (1977). It is owed no separate notice of deficiency, because it has been adequately informed by virtue of the notice to the taxpayer. Under such circumstances, to require that the corporation be furnished with an identical "ticket to the Tax Court" would be superfluous and unduly wasteful of both administrative and judicial resources. Neither the statute nor its legislative history support such a conclusion.

Accepting Pacific's view that it is *not* Park's alter ego yields no different result. Should the two entities be treated as unrelated, Pacific, in effect, becomes a third party, without the right to contest the merits of the taxpayer's assessment. *See* 26 U.S.C. § 7426(c) (1976). The corporation, of course, retains a right to contend that the IRS has wrongfully levied upon its property in

order to satisfy the tax liability of another person. This complaint, however, properly arises not in the Tax Court but in the District Court, under section 7426(a). Indeed, Pacific relied on the latter remedial provision here. An action to contest alter ego status was prosecuted in District Court, and is appealed to this forum. Absence of parallel, duplicative litigation in the Tax Court is hardly evidence that Pacific was denied appropriate judicial access or statutory notice.

As the owner of property levied upon, Pacific *was* entitled to notice of the seizures themselves. 26 U.S.C. § 6335(a) (1976). Such notice, including a description of the property seized, protects *inter alia* the rights of innocent third parties. The requirement that such notice be "as soon as practicable after seizure" suggests a desire to assure more immediate access to judicial review than may be otherwise available under the provisions governing notice of deficiency. *Cf.* 26 U.S.C. §§ 6861(b), 6213(a) (1976). We can find no indication in the record that notice required under section 6335 was not received. Appellant, as plaintiff below, carried the burden of proving the Government's failure to follow prescribed statutory procedures. Because this issue was not raised before either the District Judge or this panel on appeal, we must assume that Pacific received the notice to which it was lawfully entitled.

In addition to questioning the Service's statutory compliance, Pacific asserts its constitutional right to a prompt hearing, which it allegedly did not receive. Relying on a line of cases that confers an opportunity to be heard prior to the taking of property, appellant argues that lack of promptness here interfered with its right to due process of law under the Fifth Amendment. *See generally North Georgia Finishing, Inc.* v. *DiChem, Inc.*, 419 U.S. 601 (1975); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972).

The opportunity to be heard in accordance with principles of due process is not absolute. Its nature and timing require "appropriate accommodation of the competing interests." *Goss* v. *Lopez*, 419 U.S. 565, 579 (1975). The jeopardy collection power exercised by the IRS, while directed to exigent circumstances, is a critical aspect of the overall self-assessment tax system. *G. M. Leasing Corp.* v. *United States*, 429 U.S. 338, 350 (1977). Government's substantial interest in swiftly securing its revenues has been found to justify seizure of assets without a prior hearing. *E.g., Commissioner of Internal Revenue* v. *Shapiro*, 424 U.S. 614, 630 n. 12 (1976); *Fuentes* v. *Shevin*, *supra*, 407 U.S. at 92.

It is conceded that under the law applicable at the time, taxpayers challenging jeopardy seizures were denied access to a judicial forum for up to 60 days, and no provision existed for preliminary inquiry or review at the administrative level. The Supreme Court has expressly reserved judgment as to whether a 60-day delay following jeopardy seizure of a taxpayer's assets amounts to denial of procedural due process.[16] In the present con-

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[16] Laing v. United States, 423 U.S. 161, 183-84 n.26 (1976). *See also* Commissioner of Internal Revenue v. Shapiro, 424 U.S. 614, 630 n.12 (1976). The Court in *Shapiro*, while encouraging administrative inquiry well before the 60-day period expires, did not impose such inquiry as a constitutional requirement. Congress, however, responded to the Court's suggestion, and enacted a scheme for expedited administrative and judicial review of jeopardy assessment procedures. Pub. L. No. 94-455, § 1204(a), 90 Stat. 1695, *codified at* 26 U.S.C. § 7429 (1976). *See* S. Rep. No. 938, Part I, 94th Cong., 2d Sess. 363-66, *reprinted in* [1976] U.S. Code Cong. & Admin. News 3439, 3792-95. Under this scheme, which became effective on February 28, 1977, the taxpayer must receive within five days a written statement explaining the basis for the government's determination that tax collection was in jeopardy. He then can initiate administrative and judicial review on an accelerated schedule, resulting in a judicial

text, however, this matter is without consequence. Pacific has insisted throughout these proceedings that it is *not* the delinquent taxpayer. As a third party challenging the Government's finding of a nexus between itself and Park, its proper avenue of redress is in the District Court under section 7426.[17] *See Al-Kim, Inc.* v. *United States*, 610 F.2d 576, 579-80 (9th Cir. 1979); *Flores* v. *United States*, 551 F.2d 1169 (9th Cir. 1977). Nothing in that statutory provision prohibits or otherwise limits the right to bring an immediate action in order to contest the Government's levy.[18] The fact that Pacific did not choose to act immediately, or to seek preliminary or emergency relief, cannot be construed as a bar to prompt judicial access. Because the statutory scheme affords ample and prompt hearing rights to affected third-party property holders, no constitutional problem arises.[19]

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determination as to the reasonableness of the jeopardy assessment within as little as 40 days.

[17] Once again, if it is assumed that Pacific is the taxpayer's alter ego, then the corporation's position is identical to that of its owner. Park has brought an action challenging the assessment in Tax Court. Any related constitutional challenge should be raised in that pending action. Knowles v. Hirsch, 65 F. Supp. 690 (D.D.C. 1946) (three-judge court).

Because the new section 7429 procedures, described in note 16 *supra*, place an initial burden on the government, and the initial required statement of reasons implicates the government's contention that a taxpayer and his alter ego are one and the same, it would appear that Pacific shares with Park the right to seek expedited review. Thus as a policy matter, third parties charged with alter ego status are now assured an early ruling on the question of whether collection of a delinquent tax from the alter ego's assets is in jeopardy.

[18] Under section 7426(b)(1), a third party upon sufficient showing of irreparable injury may enjoin the enforcement of such a levy.

[19] At the post-levy proceeding, the Service must justify its extraordinary action in connecting a third party's property

District Court Findings

Finally, turning to the merits, Pacific contends the District Court's findings of fact constitute plain error. Claiming that the trial judge relied primarily on stale evidence and ignored more relevant recent developments, Pacific urges that the record properly understood utterly fails to justify a disregard for its separate corporate status.

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to the particular delinquent taxpayer. The government's burden of establishing a basis for its summary seizure will vary, depending on the type of relief sought and the timing of the judicial inquiry. *See generally* Enochs v. Williams Packing & Navigation Co., 370 U.S. 1 (1962); Flores v. United States, *supra*, 551 F.2d at 1175 nn.5-6. In this instance, the parties do not raise the issue of what precise standard was or ought to have been applied at trial. The District Judge did not address the matter in his opinion below. It is, however, important to distinguish Pacific's situation from one in which the third party seeks prior injunctive relief or an immediate hearing following seizure.

The moving party, of course, retains the ultimate burden of proof in its attempt to persuade a District Court that government action should be overturned. A government showing of probable cause, familiar in other Fourth Amendment settings, can rebuff immediate challenges to the propriety of a levy. However, stronger support from the IRS is needed where, as here, the basis for government action is explored in depth during discovery, and the trial court is rendering its final judgment. Considerations of fairness impel us to conclude that once the factual record has been fully developed over time, and the seizure of property threatens to become permanent, the government must establish its asserted nexus between taxpayer and a third party by substantial evidence.

We are applying this stronger standard for purposes of review. Accordingly, the trial judge's conclusion that the government had reasonable grounds for disregarding Pacific's corporate existence must be supported by substantial evidence in the record if we are to affirm.

The concept of district corporate entity has long served useful business purposes, encouraging risktaking by individual investors as well as overall convenience of financial administration. *See generally Moline Properties, Inc.* v. *Commissioner of Internal Revenue*, 319 U.S. 436 (1943). Ordinarily, such considerations justify treating the corporation as a separate entity, independent of its owner. *Quinn* v. *Butz*, 510 F.2d 743, 757 (D.C. Cir. 1975). On occasion, however, this concept is abused, and yields results contrary to the interests of equity or justice. Courts have not hesitated to ignore the fiction of separateness and approve a piercing of the corporate veil when the corporate device frustrates clear intendment of the law. *Id.* at 757-58 (citing cases). The Government's inability otherwise to satisfy legitimate tax debts clearly may form a sound basis for such disregard of corporate form. *See, e.g., Avco Delta Corp. Canada Ltd.* v. *United States*, 540 F.2d 258, 264 (7th Cir.), *cert. denied*, 429 U.S. 1040 (1976); *G. M. Leasing Corp.* v. *United States*, 514 F.2d 935 (10th Cir. 1975), *rev'd in part on other grounds*, 429 U.S. 338 (1977).

Given the diversity of corporate structures and the range of factual settings in which unjust or inequitable results are alleged, it is not surprising that no uniform standard exists for determining whether a corporation is simply the alter ego of its owners. The fact of sole ownership is not by itself sufficient, although it is certainly not irrelevant. Evidence of plain fraud is similarly of probative value, though not a prerequisite. *DeWitt Truck Brokers, Inc.* v. *W. Ray Fleming Fruit Co.*, 540 F.2d 681, 684 (4th Cir. 1976). We have previously suggested that the court may ignore existence of the corporate form whenever an individual so dominates his organization "as in reality to negate its separate personality." *Quinn* v. *Butz, supra*, 510 F.2d at 758. Obviously, control by the individual must be active and substantial, but it need not be exclusive in a hypertechni-

cal or day-to-day sense. The test is a practical one, based largely on a reading of the particular factual circumstances. As a fact issue, its ultimate determination is dependent upon the sound discretion of the trial judge in his appraisal of the evidence. His resolution will be left undisturbed on appeal unless clearly erroneous.

In the course of these proceedings, the trial court heard from numerous employees and officers of Pacific, from Mr. Park, and from the IRS Special Agent in charge of the investigation. After reviewing the voluminous testimony and documentation adduced at deposition and trial, we are entirely persuaded that no error was made in the finding of alter ego status.

Park founded Pacific in 1968, and was its president and sole shareholder on a continuous basis thereafter. Despite protestations in the record, there is no evidence that a major corporate decision was ever made by anyone other than Park. The Board of Directors played no meaningful role. There is serious doubt as to whether a Board existed at all prior to December, 1974. After that date, directors met infrequently. When they did meet, Board members approved corporate decisions and policies without discussion or question. Many purported meetings consisted of brief telephone conversations. Individual officers performed ministerial functions at the behest of the president. They exercised no significant discretionary authority. The conclusion that board members neither controlled nor influenced corporate affairs is amply supported.

It is equally apparent that Park used corporate funds and staff for his own private purposes on a regular basis. He wrote checks on Pacific's bank accounts to cover unrelated personal and business expenses. Pacific employees served as Park's chauffeur, managed his domestic staff, entertained his guests, and ran other per-

sonal errands for him, often of an elaborate international nature. They spent substantial amounts of time, at his behest, on these various personal matters. Pacific provided similar administrative and managerial services to assist Park in other business ventures. The record sufficiently establishes that the corporation operated primarily, if not exclusively, to perform staff functions for its founder and sole shareholder.

This conclusion is further supported by substantial evidence that Park manipulated the few ventures in which Pacific was involved in order to advance his own distinct business or financial interests. To this end, he assigned profits from work performed by Pacific either to himself or to other companies. He forgave bad loans made to influential figures with Pacific funds. He also assigned funds to Pacific for ventures in which the corporation had played no part. By persistently exercising control over the assignment of profits and payments, Park effectively used Pacific as an incorporated pocketbook. In short, the record is replete with evidence that the corporation was fundamentally an extension of its taxpayer-owner. The trial court's findings on this score were clearly well-founded and not error.

CONCLUSION

Pacific's general creditors were properly dismissed. Although the partly secured creditor, Valley Finance, Inc., had standing to sue, its lack of priority also warrants dismissal. For the reasons set forth above, Pacific's statutory and constitutional due process claims are without merit, as is the challenge to factfinding at trial. Accordingly, the judgment of the District Court in both cases is

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VALLEY FINANCE, INC., et al.,

Plaintiffs,

v. C.A. No. 7-0089

UNITED STATES OF AMERICA, et al.,

Defendants.

MEMORANDUM

This case is presently before the Court on the federal defendant's motion to dismiss and plaintiffs' motion for summary judgment . The Court has carefully considered the points and authorities filed by the respective parties herein, as well as the pertinent pleadings filed in the related case of Pacific Development, Inc. v. U.S.A., C.A. No. 77-690. Based on said consideration, the Court concludes that it must grant defendants motion to dismiss.

Plaintiffs are four creditors of Pacific Development, Inc. (hereinafter, "PDI"), the properties of which have been the subject of

federal tax liens by the United States Government. These liens were based on the Government's contention that PDI is merely the alter ego or nominee of Tongsun Park, the sole shareholder of PDI, who is the subject of jeopardy tax assessments of over $4.5 million. Plaintiffs contend that because of the Government's actions against PDI, they have been unable to collect from PDI sums to which they are entitled.

Plaintiffs' sole claim against the United States, if they have any cognizable claim at all, is based on 26 U.S.C. § 7426(a) which provides:

> If a levy has been made on property or property has been sold pursuant to a levy, any person . . . who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States.

Plaintiffs allege that the Government filed liens and levied upon PDI's various properties, including its property at 1604 K Street N.W., in Washington, D.C., and that said levies were "wrongful" within the meaning of the section 7426(a).

The Court interprets the phrase "interest in or lien on such property" as requiring a specific property interest, e.g., a leasehold or a vested remainder, in the particular property subject to the challenged levy. Plaintiffs Lawrence D. Huntsman and Frank L. Frantz are mere general creditors of PDI. Plaintiff Marina V. McLaren, who is an employee of PDI, is also in the position of a general creditor of PDI, though she argues that she has some form of "employee's lien" upon PDI's properties. None of these plaintiffs have a specific property interest in any of PDI's properties allegedly levied upon by the United States. None of them can therefore properly maintain this action under 26 U.S.C.

§ 7426(a), and they thus fail to state a claim upon which relief can be granted.

Plaintiff Valley Finance is in the same position as the other plaintiffs with respect to all of PDI's properties except the property at 1604 K Street N.W., in Washington, D.C. This real property was recently sold by consent of all the parties hereto and the proceeds of said sale are presently being held in escrow. With respect to this 1604 K Street N.W. property, plaintiff Valley Finance alleges that it has a specific property interest in the form of a second deed of trust, which was entered into on February 15, 1977, and recorded on March 17, 1977. This second deed of trust would in the usual case represent a sufficient property interest to support a suit under 26 U.S.C. § 7426(a). However, in the instant case, the alleged property interest was not created until after the Government filed its lien and allegedly levied*/ on 1604 K

*/ There appears to be a substantial question as to whether, and if so, when, the 1604 K Street N.W. property was actually subject to

Street N.W. Since the Government's alleged levy preceded the second trust agreement between PDI and Valley Finance, PDI could not property [sic] have conveyed any interest to Valley Finance since the Government's levy effectively divested PDI of title over the 1604 K Street N.W. property. Accordingly, the Court concludes that Valley Finance cannot properly maintain this action under 26 U.S.C. § 7426(a), and it thus fails to state a claim upon which relief can be granted.

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* Continued

levy by the United States. The Government appears to contend that this particular property was not subject to levy. if this were true, no suit under section 7426(a) would be appropriate with respect to this particular property. The complaint alleges that this particular property, as well as other of PDI's properties, was subject to both lien and levy on January 19, 1977. If this were true, then Valley Finance's claim under section 7426(a) would in any case be barred by the nine month statute of limitations of 26 U.S.C. §6532(c). In view of the Court's conclusion that plaintiff Valley Finance fails to state a claim under 26 U.S.C. § 7426(a) because of its lack of a sufficient "interest" in the 1604 K Street N.W. property, it is unnecessary to resolve the aforestated dispute.

Based on the foregoing, the Court will grant defendants' motion to dismiss. However, the Court's conclusion herein that none of the plaintiffs in this action have properly stated a claim under 26 U.S.C. § 7426(a) does not mean that these individuals and this corporation will not ultimately recover the sums properly due and owing them by PDI. PDI will still be able to assert its rights against the United States and if it prevails in C.A. No. 77-690, none of the plaintiffs herein will be prejudiced by the Court's order of dismissal. Moreover, the Government has expressly stated that it will permit the repayment of legitimate creditors of PDI, including the individual plaintiffs herein -- McLaren, Huntsman, Frantz. Indeed, it appears to the Court that the Government has already permitted these individuals to receive a partial payment of these sums from the proceeds of the sale of the 1604 K Street N.W. property. The Court implores the government

to take steps to ensure that these individuals are fully compensated for the sums properly due them by PDI.

Again, Valley Finance is in a different posture from the individual plaintiffs. The Government continues to maintain that Valley Finance (like PDI) is merely the alter ego or nominee of Tongsun Park, and the Government will not, therefore, agree to permit Valley Finance to be compensated for its alleged loans to PDI until Tongsun Park's tax liability is fully adjudicated in the United States Tax Court. Nevertheless, as the Government has contended, Valley Finance is not without a remedy: It can institute a foreclosure suit, based on its allegedly-vlid second deed of trust, against the proceeds of the sale of 1604 K Street N.W.

An Order in accordance with the foregoing will be issued of even date herewith.

/s/

Charles R. Richey
United States District Judge

DATE: 4/25/78

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VALLEY FINANCE, INC., et al.,

Plaintiffs,

v. C.A. No. 78-0089

UNITED STATES OF AMERICA, et al.,

Defendants.

ORDER

Upon consideration of the federal defendant's motion to dismiss, plaintiff's motion for summary judgment, and the respective points and authorities in support thereof and in opposition thereto, as well as the pertinent pleadings filed in the related case of Pacific Development, Inc. v. U.S.A., C.A. No. 77-690, and for the reasons set forth in this Court's Memorandum of even date herewith, it is, by the Court, this 25 day of April, 1978,

ORDERED, that defendant's motion to dismiss be, and the same hereby is, granted; and it is

FURTHER ORDERED, that plaintiff's motion for summary judgment be, and the same hereby is, denied; and it is

FURTHER ORDERED, that the complaint herein be, and the same hereby is, dismissed.

/s/
Charles R. Richey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PACIFIC DEVELOPMENT, INC.,

Plaintiff,

v. C.A. No. 77-0690

UNITED STATES OF AMERICA,

Defendant.

ORDER

This case is presently before the Court on the motion of Valley Finance, Inc., Lawrence D. Huntsman, Frank C. Frantz, and Marina V. McLaren to intervene as party plaintiffs. Also before the Court is a motion to compel answers to requests for admissions filed by the proposed intervenors.

By a separate Memorandum and Order the complaint filed in connection with a separate suit captioned Valley Finance, Inc., et al. v. U.S.A., C.A. No. 78-0089. The basis of this dismissal was that the plaintiffs therein, who are identical to the proposed intervenors herein,

had failed to state a claim upon which relief could be granted. The claim asserted by the proposed intervenors in the instant suit is identical to that asserted in C.A. No. 78-0089, and the proposed intervenor's present claim thus also fails to state a claim upon which relief could be granted. In these circumstances, the pending motion to intervene is appropriately denied. See C. Wright & A. Miller, Federal Practice and Procedure, § 1914, at 569 (1972).

Wherefore, it is, by the Court, this 25th day of April, 1978,

ORDERED, that the motion to intervene as party plaintiffs, filed by Valley Finance, Inc., et al., be, and the same hereby is, denied; and it is

FURTHER ORDERED, that proposed intervenors' motion to compel answers to requests for admissions be, and the same hereby is, denied; and it is

FURTHER ORDERED, that counsel for

plaintiff Pacific Development, Inc., and defendant United States of America appear in Courtroom 11 at 9:30 a.m. on May 8, 1978, for a status conference in the above-captioned matter.

/s/

Charles R. Richey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PACIFIC DEVELOPMENT, INC.,

Plaintiff,

v. C.A. No. 77-0690

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION OF UNITED STATES DISTRICT JUDGE CHARLES R. RICHEY

This action was brought by Pacific Development, Inc., [hereinafter, "PDI"] for declaratory relief to remove and cancel a lien placed upon its real and personal property by the Commissioner of Internal Revenue and for damages caused by this allegedly illegal action. This cause came on for trial, and the court, for the reasons hereinafter stated, finds for the defendant.

I. BACKGROUND

PDI was incorporated under the laws of the District of Columbia on April 1, 1968. Tongsun Park has at all times owned all of the corporate stock and been president of PDI. On January 18,

1977, a delegate of the Secretary of the Treasury of the United States of America made jeopardy assessments against Tongsun Park totalling $4,500,619.20, for federal income taxes allegedly owed by Mr. Park, additions to tax pursuant to section 6654 of the Internal Revenue Code of 1954, and interest .1/ On January 19 and 20, 1977, the International Revenue Service filed notices of tax liens against PDI as the "alter ego or nominee" of Tongsun Park in Washington, D.C., and other localities. The Internal Revenue Service also levied, pursuant to section 6331 of the Internal Revenue Code of 1954, against PDI as the alter ego or nominee of Tongsun Park, with respect to the following property:

(a) monies contained in the National Bank of Washington (checking account number 1 25 7 250);

1/ Tongsun Park has filed an action in the Tax Court challenging the underlying assessment of these taxes. The action is still pending.

(b) monies contained in the National Bank of Washington (payroll account number 1 274 759);

(c) 50,000 shares of preferred stock of International Oil and Gas Corporation;

(d) three automobiles:

(1) one Mercedes Sedan;

(2) one Cadillac El Dorado Convertible;

(3) one Lincoln Limousine; and

(e) Shenandoah Life Insurance Policy (#496822) for $1 million on life of Tongsun Park and payable to PDI.

On April 21, 1977, PDI filed this action for relief from wrongful levy, pursuant to 26 U.S.C. § 7426(a); to quiet title, pursuant to 28 U.S.C. § 2410; for declaratory judgment, pursuant to 28 U.S.C. § 2201;, and for damages.

II. THE CIRCUMSTANCES NECESSARY FOR VOIDING THE INSULATION OF INCORPORATION

In this case, the government alleged that Tongsun Park owed taxes. The government

assessed PDI, a corporation owned by Park, for the taxes owed by Park.

Generally, a corporation is treated as a separate and distinct entity, independent of its owner. Quinn v. Butz, 510 F.2d 743, 757 & n.89 (D.C. Cir. 1975). Even when it is wholly owned by one individual, a corporation is recognized as an autonomous being. Id. at 757 & n.90. This fiction encourages risk-taking by insulating investors from the debts of their related but legally separate bodies. Anderson v. Abbott, 321 U.S. 349 (1944).

The insulation provided by incorporation serves important goals, but when these goals are thwarted, when the fiction of separateness no longer serves the ends of justice, the law abandons the fiction, and pierces the corporate veil. Quinn v. Butz, supra at 757 & n.91. When the corporate form is twisted to defeat public convenience, justify wrong, protect

fraud, or defend crime, the law will disregard the corporate entity concept. Id. at 758 quoting United States v. Milwaukee Refrigerator Transit Co., 142 F. 247, 255 (C.C.E.D. Wisc. 1905).

This case presents a scenario somewhat distinct from the typical piercing-the-corporate-veil paradigm. In the classic case, debts of the undercapitalized corporation are assessed against the wealthy owner for the benefit of the injured third party. See Walkovszky v. Carlton, 18 N.Y. 2d 414, 223 N.E. 2d 6 (1966). In the case before the Court, the debts of the wealthy nonresident alien shareholder are being assessed against the wholly owned local corporation. Thus, the Court is faced with what could be termed a "reverse" piercing the corporate veil problem.

"Reverse" piercing the corporate veil -- that is, disregarding the corporate form to reach assets of a corporation for debts of a shareholder -- is clearly permissible where

justice so requires. See G. M. Leasing Corp. v. United States, 514 F. 2d. 935 (19th Cir. 1975), aff'd in part and rev'd in part on other grounds, 429 U. S. 338 (1977); Stone v. Eacho, 27 F. 2d 284, 288 (4th Cir. 1942). However, the reverse piercing paradigm may alter certain factors included in the traditional test. For example, undercapitalization is often cited as a determinative factor for the traditional paradigm. See Francis O. Day v. Shapiro, 267 F. 2d 669, 673 (D. C. Cir. 1959). Where a shareholder is assessed for the debts of a corporation, undercapitalization would be a crucial indicator of an improper use of the corporate form. However, where the corporation may not square with the contours of the alleged fraud. For example, keeping a corporation poor would not indicate that an individual was hiding assets by incorporation. In fact, where a shareholder is attempting to escape his or her debts, over capitalization

of a wholly owned corporation may be an indicator of fraud and serve as a ground for penetrating the corporation's shell to reach its assets for the shareholder's debts.

Accordingly, the Court cannot mechanically apply the traditional tests to the facts of this case, but must engage in the sensitive process of assessing the relationship between PDI and Park to determine whether the corporate form was used in violation of public policy and to thwart the beneficial goals of incorporation.

III. FINDINGS OF FACT

Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the Court finds the following facts.

PDI was incorporated under the laws of the District of Columbia on April 1, 1968. Tongsun Park has at all times owned 100 per cent of the corporate stock of PDI and has been PDI's president since its incorporation.

PDI often failed to observe formalities. PDI filed no income tax returns for 1968 through 1972, and allowed its corporate charter to temporarily lapse in September of 1975 by failing to file an annual report with the District of Columbia for two consecutive years. Until 1974, the minute book did not reflect substantial board of directors' actions.

Throughout its history, PDI neglected to have a genuine board of directors. Tongsun Park treated the members of PDI's board as mere figureheads serving as a courtesy to Park. Members of the board exercised no influence or control over the corporation's affairs. The first minutes of a meeting of the board concern a meeting which supposedly occurred on December 10, 1974, six years after PDI was incorporated. Two of the persons listed as being directors at the commencement of the purported meeting were never advised that they had been "elected" directors

of the corporation. Another never attended any meetings of the board, and was merely a figurehead for Park. The minutes, therefore, falsely state that meetings took place at which the board member was present. In fact, the evidence shows that many of the purported meetings never occurred.

From 1968 to 1973, Tongsun Park used PDI completely for personal purposes. A bank account was opened on May 20, 1968, through a purported corporate resolution of PDI. At this time, PDI did not have a Board of Directors, and an employee of another corporation owned by Park signed the resolution as secretary to establish the account. Park deposited various funds in this account and wrote numerous checks for personal purposes during 1968 through 1973. In effect, Park used the corporate account during this period as a personal checking account.

Throughout PDI's existence, Park exer-

cised control over payments by the corporation and made all of the important corporate decisions. As sole shareholder, Park viewed money in his corporation's accounts as his, to be used as he saw fit. Park viewed PDI employees as his own staff.

Park used PDI to further his own business ventures and exercised total control over what profits of those ventures would be assigned to PDI, keeping PDI in a position where it could not meet its operating expenses. Park engaged in many shipping ventures in his name or the name of one of his other corporations. None of the profits of these ventures went to PDI, but PDI paid substantial expenses for them without charge to Park. Moreover, PDI personnel, without charge to Park or any other corporation, devoted substantial time to these endeavors. This is illustrated by Park's use of PDI resources on Japan Lines matters; the Burma Oil Tankers, Ltd. settlement; the GATX

matter, PDI's paying Park's expenses for his trips involving shipping matters; Park's use of B. Y. Lee, who was paid by PDI, on shipping matters for other corporations; and by Park's use of PDI's resources on various shipping matters.

In addition to taking care of Park's own business affairs, PDI employees also acted as Park's personal caretakers, caring for his domestic and other non-business affairs. Park was not charged for the time the employees spent in doing these personal services for him. Park's chauffeur was paid by PDI and PDI employees entertained Park's guests.

PDI's meagre investments were designed to prevent Park from realizing United States source income. As a nonresident alien, Park's United States source income was subject to federal income tax. PDI invested in various assets on Park's behalf so that he could avoid realizing United States source income. Most of these investments were in real estate or

stock, as well as in automobiles that were held for the personal use of Park and his friends. Ventures in PDI's name were generally insignificant, and some appear to have been an afterthought as Park's American enterprises began to disintegrate.

Finally, rather than investing capital in PDI, Park made repeated non-interest-bearing loans to the corporation. Loans were made to PDI only when necessary to meet operating expenses.

In conclusion, Park used PDI facilities and employees as personal caretakers and to further his business ventures, exercised total control over what profits of those ventures, if any, would be assigned to PDI, and assigned few, if any, profits to PDI, keeping it in a position where it could not meet its operating expenses. The circumstances surrounding PDI's investments reveal that PDI served as a mere instrumentality of Park, existing to service his per-

sonal and economic desires. Park treated the corporation as a mere pocketbook. Whenever he desired, he used the corporate funds for his own purposes, and he loaned the corporation money only as necessary to meet operating expenses. Overall, there exists an inextricable unity between Park and PDI.

IV. CONCLUSIONS OF LAW

The Court finds that PDI is the alter ego of Tongsun Park. To treat PDI and Park as independent would ignore reality and be unjust to Park's creditor, the United States. The factors which this Court deems conclusive of the relationship between Park and PDI are:

> (a) the complete control exercised over PDI by Park for his individual purposes, such that PDI became a mere instrumentality of Park and a facade for his operations; see G. M. Leasing Corp. v. United States, 514 F. 2d 935, 939-40

(10th Cir. 1975), aff'd in part and rem'd in part on other grounds 429 U.S. 338 (1977); TSS Sportswear, Ltd. v. Swank Shop (Guam) Inc., 380 F.2d 512, 516-17 (9th Cir. 1967);

(b) the use of PDI staff and facilities for the benefit of Park without charge, thereby intermingling the finances of Park and PDI; see In re County Green Ltd. Partnership, 438 F. Supp. 701, 707 (W.V. Va. 1977); Harris v. Wagshal, 343 A.2d 283, 287 (D.C. Ct. Ap. 1975) (per curiam);

(c) the failure to observe corporate formalities and to maintain a genuine board of directors; see DeWitt Truck Brokers, Inc. v. W. Roy Fleming Fruit Co., 540 F.2d 681, 686 & n.14 (4th Cir. 1976); Palmer v. Stokely, 255 F. Supp. 674, 679 (W.D. Okla. 1966); Harris v. Wagshal, supra at 287; and

(d) the failure to supply PDI with sufficient capital to meet its operating expenses; see Anderson v. Abbott, 321 U.S. 349, 361 (1944); Francis O. Day v. Shapiro, 267 F.2d 669, 673 (D.C. Cir. 1959).

To interfere with the government's attempt to assess Park's debts against PDI would be a serious injustice. Accordingly, the levies against PDI's assets to collect Park's liabilities were not wrongful.

An order in accordance with this memorandum shall be issued of even date herewith.

/s/

Charles R. Richey
United States District Judge

DATE: January 3, 1979

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PACIFIC DEVELOPMENT, INC.,

Plaintiff,

v. C.A. No. 77-0690

UNITED STATES OF AMERICA,

Defendant.

O R D E R

Presently before the Court are motions to strike defendant's proposed findings of fact and conclusions of law. The Court has considered the plaintiff's objections in determining its findings of fact, and feels that striking objectional material is not necessary. Material not called for by the Court's order has not been considered, and matters referred to, which were admitted for impeachment only, have been considered for those purposes only. Accordingly, it is, by the Court this 3 day of January, 1979,

ORDERED, that the motions of the plaintiff to strike be, and the same hereby are, denied.

/s/

Charles R. Richey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PACIFIC DEVELOPMENT, INC.,

Plaintiff,

v. C.A. No. 77-0690

UNITED STATES OF AMERICA,

Defendant.

ORDER

Presently before the Court is a motion for partial summary judgment by the plaintiff. In the Memorandum issued of even date herewith, the Court found that Pacific Development, Inc. [hereinafter, "PDI"], is the alter ego of Tongsun Park. Therefore, the levy by the government against PDI's assets was proper because notice to Park was as a practical matter notice to PDI. Furthermore, there is no right to a pre-levy hearing. See Fuentes v. Shevin, 407 U.S. 67, 91-92 & n.24 (1972). Accordingly, it is, by the Court, this 3 day of January, 1979,

ORDERED, that the motion of the plaintiff for partial summary judgment be, and the same hereby is, denied.

/s/
Charles R. Richey
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PACIFIC DEVELOPMENT, INC.,

Plaintiff,

v. C.A. No. 77-0690

UNITED STATES OF AMERICA,

Defendant.

ORDER

Upon consideration of the trial held in this matter and in accordance with the Memorandum issued of even date herewith, it is, by the Court, this 3rd day of January, 1979,

ORDERED, that judgment be, and the same hereby is, entered for the defendant.

/s/

Charles R. Richey
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PACIFIC DEVELOPMENT, INC.,

Plaintiff,

v. Civil Action No. 77-0690

UNITED STATES OF AMERICA,

Defendant.

ORDER

Upon consideration of Plaintiff's Motion to Vacate this Court's Order of December 8th, 1978, granting Defendant's Motion to receive additional briefs, and further upon consideration of Plaintiff's Opposition to that Motion, it is Hereby ORDERED, this 11 day of January, 1979 that the Court's ORDER of December 8th is VACATED, and that further, Defendant's Brief which is the subject of that Order, as well as Plaintiff's reply thereto, shall not be accepted into the record of this case.

/s/

Judge, United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PACIFIC DEVELOPMENT, INC.,

Plaintiff,

v. Civil Action No. 77-0690

UNITED STATES OF AMERICA,

Defendant.

ORDER

This action is currently before the Court on the plaintiff's motion to stay execution of judgment and for a protective order and the government's motion to amend the Court's findings of fact.

In its motion to stay execution and for a protective order, the plaintiff displayed some confusion concerning the Court's findings of fact. The plaintiff suggested that the Court found Tongsun Park to be a non-resident alien for federal tax purposes. Understandingly, the government then moved for clarification of the Court's order pursuant to Rule 52(b) of the Federal Rules of Civil Procedure.

The issue before this Court was whether the plaintiff was the alter ego of Tongsun Park. An important factor in that determination was the way in which Park directed certain investments to the plaintiff. Park's behavior was understandable because he believed himself to be a non-resident alien. The relevent issue in this proceeding was Park's subjective perceptions that motivated his behavior. Whether Park was a non-resident alien for tax purposes was completely irrelevent to this Court's determination.

The issue whether a person is a non-resident alien requires a complex factual inquiry. This issue was not litigated in this forum, was not briefed by the parties, and was not decided by this Court.

Accordingly, it is, by the Court, this 3 day of January, 1979,

ORDERED, that the Court's Memorandum Opinion of January 3, 1979, be, and the same hereby is, amended as follows:

1. The sentence begining at line 12, of page 3, is amended to state:

> In the case before the Court, the debts of a wealthy shareholder, who maintains that he is a non-resident alien, are being assessed against the wholly owned local corporation.

2. The sentence beginning at line 12 of page 6 is amended to state:

> Believing himself to be a non-resident, Park wanted to avoid United States source income which would be nevertheless subject to federal tax.

And it is

FURTHER ORDERED, that the plaintiff's motion to stay execution of judgment and for a protective order be, and the same hereby is, denied.

/s/

Judge Charles R. Richey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Valley Finance, et al.,

Plaintiff,

vs. Civil No. 78-0089

United States of America,

Defendant.

NOTICE OF APPEAL

Notice is hereby given this 16th day of May 1978, that Valley Finance, Inc., Marina V. McLaren, Lawrence W. Huntsman, and Frank C. Frantz hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 26th day of April, 1978 in favor of the United States of America against said Valley Finance, Inc., Marina V. McLaren, Lawrence W. Huntsman, and Frank C. Frantz.

/s/

Charlton, Imse & Tupling
2011 I St., N.W., Suite 303
Washington, D.C. 20006
296-2975

Walter T. Charlton

Attorney for

Valley Finance, Inc., Marina V. McLaren, Lawrence W. Huntsman and Frank C. Frantz

CLERK: Please mail copies of the above Notice of Appeal to the following at the addresses indicated:

Lawrence D. Huntsman
Attorney for Pacific Development
10560 Main St., Fairfax, VA 22030

and

Earl J. Silbert, U.S. Attorney
U.S. Court House
John Marshall Place
Washington, D.C.

John J. McCarthy
Donald J. Gavin
S. Martin Teel, Jr.
F. Gerald Burnett
Attorneys, Tax Division
U.S. Department of Justice
Washington, D.C. 20530

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PACIFIC DEVELOPMENT, INC.,

Plaintiff,

vs. Civil No. 77-0690

UNITED STATES OF AMERICA

Defendant.

NOTICE OF APPEAL

Notice is hereby given this 8th day of January, 1979, that

PACIFIC DEVELOPMENT, INC.

hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 3rd day of January, 1979 in favor of

against said PACIFIC DEVELOPMENT, INC.

Walter T. Charlton

Attorney for

PACIFIC DEVELOPMENT, INC.

CLERK: Please mail copies of the above Notice Notice of Appeal to the following at the addresses indicated:

S. Martin Teel, Jr., Esquire
Attorney, Tax Division
Department of Justice

Earl Silbert, U.S. Attorney
for the District of Columbia
U.S. Court House
Washington, D.C. 20001

Honorable Griffin Bell
Attorney General of the United States
U.S. Department of Justice
Washington, D.C. 20530

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Pacific Development, Inc.

Plaintiff.

vs Civil No. 77-0690

United States of America

Defendant.

NOTICE OF APPEAL

Notice is hereby given this 8th day of February, 1979, that Pacific Development, Inc. hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 31st day of January, 1979 in favor of the United States of America against said Pacific Development, Inc.

Walter T. Charlton
2011 I Street, N.W. (303)
Washington, D.C. 20006
296-2975

Attorney for

Pacific Development, Inc.

CLERK: Please mail copies of the above Notice of Appeal to the following at the

addresses indicated:

S. Martin Teel, Jr., Esquire

Department of Justice

Washington, D.C.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 78-1585 September Term, 1978

Valley Finance, Inc., et al.,

Appellants

v. Civil Action No. 78-0089

The United States of America, et al.

No. 79-1151

Pacific Development, Inc.,

Appellant

v. Civil Action No. 79-0690

United States of America, et al.,

No. 79-1301

Pacific Development, Inc.,
Appellant

v. Civil Action No. 77-0690

United States of America, et al.

O R D E R

On consideration of appellant's motion to consolidated appeals (Nos. 79-1151 and 78-1301),

and for enlargement of time to file brief, and of appellants' motion for enlargement of time for filing brief in No. 78-1585, it is

ORDERED that Nos. 79-1151 and 79-1301 are consolidated. It is

FURTHER ORDERED that the Clerk is directed to schedule No. 78-1585 with Nos. 79-1151 and 79-1301 on the same day and before the same panel, and, it is

FURTHER ORDERED that the time for filing appellants' initial briefs in the above cases is extended to and including May 5, 1979.

FOR THE COURT:

GEORGE A. FISHER, Clerk

BY: /s/
Daniel M. Cathey

First Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1585 September Term, 1980

Valley Finance, Inc., et al. Civil Action 78-0089

Appellants

v. FILED OCT 17, 1980

United States of America, et al.

No. 79-1151

Pacific Development, Inc.,

Appellant Civil Action 77-0690

v.

United States of America, et al.

And Consolidated Case No. 79-1301

Before: Tamm and Mikva, Circuit Judges;
Gesell*, U.S. District Judge for the
District of Columbia.

ORDER

Upon consideration of the petition for rehearing filed in these cases by appellants (Valley Finance, Inc., et al.), it is

ORDERED, by the court, that appellants'

aforesaid petition for rehearing is denied.

Per Curiam

For the Court:

/s/

George A. Fisher

Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §292(a).

Exhibit A

Pacific Development, Inc.

Pro-Forma (Computed From Records and Testimony in Evidence)

Financial Statement as of December 31, 1976

ASSETS

Total Assets Per Books Schedule A-1	$2,022,508.00
Increase in Market value of International Oil & Gas Stock	1,000,000.00
Add: Goodwill-Not Booked	500,000.00
Total Assets	$3,522,508.00

Exhibit A (continued)

LIABILITIES	
Accounts and Notes Payable	$2,288,262.00
Less: Park Advances Capitalized in 1976	2,000,000.00
Notes and Accounts Payable	$ 288,262.00
Loans from Stockholder	366,926.00
Total Liabilities	$ 655,188.00
CAPITAL AND ACCUMULATED EARNINGS (DEFICIT)	
Capital Stock (as of 12/31/75)	$ 265,000.00
Add: Capitalized in 1976	2,000,000.00
Total Capital Stock 1/17/77	$2,265,000.00
Deficit at 12/31/75	($605,878.00)
Add: Goodwill Not Booked	500,000.00
Increase in Market Value of International Oil &Gas Stock	1,000,000.00
Loss for the year 1976	(291,802.00)
Earnings and Profits	$ 602,320.00
Total Liabilities and Capital	$3,522.508.00

Schedule A-1

Pacific Development, Inc.

Analysis of Total Assets in Evidence As of

December 31, 1976

Total Cash in Bank 12/31/76	$77,394.00
Accounts Receivable	21,861.00
Notes Receivable	25,979.00
Deposits	50,951.00
Cash Value-Officer's Life Insurance	39,000.00
Prepaid Expenses	25,491.00
Total Current Assets 12/31/76	$240,676.00
Investments	
International Oil &Gas-Stock	$500,000.00
3040 M Street-Notes	395,000.00
Wide World of Travel-Stock	37,500.00
Pacific Enterprises, Inc. (Subsidiary)	146,865.00
Lambus, Inc. #1 (Subsidiary)	250,000.00

Schedule A-1 (Continued)

Suter's Tavern-Notes	142,500.00
Total Investments	$1,471,865.00
Less: Reserve for Bad Debts	355,500.00
Book Value of Investments	$1,116,365.00
Fixed Assets	
Land-1604 K St., N.W.	$ 40,000.00
Land-Scarsdale, N.Y.	11,316.00
Building-1604 K St., N.W.	363,303.00
Building-Scarsdale, N.Y.	64,127.00
Ocean City Condominium	43,200.00
Office Equipment-K St.	31,711.00
Building Improvements-K St.	54,718.00
Equipment-K St.	5,010.00
Equipment-Ocean City	4,108.00
Improvements-Woodland Dr.	4,000.00
Automobiles & Accessories	43,974.00
	$665,467.00
Total Assets	$2,022,508.00

No. 80-1685

MAY 2 1981
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

PACIFIC DEVELOPMENT, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1685

PACIFIC DEVELOPMENT, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

These consolidated cases arise out of the Commissioner of Internal Revenue's jeopardy assessment of income taxes, exceeding $4.5 million, against Tongsun Park on January 18, 1977 (Pet. App. 3a). Pursuant to that jeopardy assessment, the Service levied upon the assets of petitioner Pacific Development, Inc. (PDI), a corporation wholly owned by Tongsun Park, on the ground that PDI was merely an alter ago of Park. (See, in this respect, *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 350-351 (1977).)

Valley Finance, Inc. (Valley), another corporation wholly owned by Tongsun Park, and the three individual petitioners brought suit in the United States District Court for the District of Columbia for wrongful levy under Section 7426(a) of the Internal Revenue Code of 1954 (26 U.S.C.) (Pet. 15-16, 26). The only interest of the three individuals was as general or unsecured creditors of PDI. The court of

appeals held that Section 7426(a) did not grant general creditors a cause of action and affirmed the district court's dismissal of the action as to the three individuals (Pet. App. 7a-9a). Although Valley was a secured creditor, entitled to sue under Section 7426(a), the court dismissed its suit because its security interest was primed by the government's tax lien (Pet. App. 9a-10a).

Petitioner PDI also brought suit for wrongful levy under Section 7426 (Pet. 26). Suit under the provisions of Section 7426 is the appropriate course of action for an alleged alter ego corporation which denies that status, and claims that its assets should not have been seized to pay the tax debts of its alleged principal. *Al-Kim, Inc.* v. *United States*, 610 F. 2d 576, 579-580 (9th Cir. 1979); *Flores* v. *United States*, 551 F. 2d 1169, 1174-1175 (9th Cir. 1977). But petitioner PDI's suit was limited by Section 7426(c), which provides that, for actions brought under Section 7426, the tax assessment "shall be conclusively presumed to be valid" (see Pet. 16). Hence, petitioner PDI had no right to claim under Section 7426 that Tongsun Park did not owe the tax assessed in the jeopardy assessment. The courts below therefore correctly accepted the validity of the Commissioner's jeopardy assessment.[1]

Petitioner PDI also claims (Pet. 31-35) that the Service's failure to issue to it a notice of deficiency for the taxes assessed against Tongsun Park constituted a violation of its rights. But the court of appeals correctly rejected this contention (see Pet. App. 11a). Under Section 6212 of the Code it is the taxpayer who is entitled to a notice of deficiency. Tongsun Park received the appropriate notice of deficiency and is contesting the deficiency in *Park* v. *Commissioner*, No. 3410-77, in the Tax Court. Insofar as PDI is the alter

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[1]The propriety of that assessment is currently before the Tax Court in *Park* v. *Commissioner*, No. 3410-77.

ego of Tongsun Park, notice to him was notice to it, and there is no purpose to be served by a separate notice of deficiency. On the other hand, if PDI is not an alter ego of Park, then it is a third party which has no authority to litigate Park's tax liability. See Section 7426(c) of the Code. In either event, there was no need for PDI to receive a notice of deficiency.

Finally, petitioner PDI complains (Pet. 35-37) that the court of appeals erred in ruling that it was the alter ego of Tongsun Park and in disregarding its separate corporate existence in the absence of a showing of fraud or unconscionable conduct. In fact, the court of appeals simply followed its earlier precedent in *Quinn* v. *Butz*, 510 F. 2d 743, 758-760 (1975), holding that one seeking to have the separate existence of an alter ego corporation disregarded need only show that recognition of the separate existence would visit "an injustice upon him." The court of appeals ruled that the Commissioner's inability to collect taxes would be such an "injustice" that would warrant disregarding the existence of Park's alter ego corporation (Pet. App. 16a). This ruling is in accord with *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 351 (1977), and with the opinions of at least two other courts of appeals. *Avco Delta Corp. Canada Ltd.* v. *United States*, 540 F. 2d 258, 264-265 (7th Cir.), cert. denied, 429 U.S. 1040 (1976); *Terrapin Leasing, Ltd.* v. *United States*, No. 79-1086 (10th Cir. Apr. 6, 1981).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MAY 1981

DOJ-1981-05